

1  
2 THE HONORABLE RICARDO S. MARTINEZ  
3 Motion Calendar Date: Friday, March 18, 2005  
4 Oral Argument Requested  
5  
6  
7  
8  
9

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 DON EASTER AND SHIRLEY EASTER,  
11 and the marital community composed  
12 thereof; and DEBRA OGUNLEYE, on their  
13 own behalf and on behalf of all others  
14 similarly situated,

Plaintiffs,

15 vs.  
16

AMERICAN WEST FINANCIAL, a Nevada  
corporation, et al.,

17 Defendants.

CLASS ACTION

**CONSOLIDATED UNDER**  
No. C01-1004R

[This relates to *Stone, et al. v. American Mortgage Professionals, Inc., et al.* \*(C01-1028R)]

DEFENDANT AMERICAN MORTGAGE PROFESSIONALS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS ON COUNTERCLAIM FOR STATUTORY ATTORNEYS' FEES

**(Clerk's Action Required)**

20 Pursuant to Fed. R. Civ. P. 56, RCW 19.52.032, and other authority cited herein,  
21 Defendant American Mortgage Professionals, Inc. ("AMP") hereby moves the Court for  
22 an order awarding summary judgment against plaintiffs on AMP's counterclaim for  
23 statutory attorneys' fees.

24 DEFENDANT AMERICAN MORTGAGE PROFESSIONALS  
INC.'S MOTION FOR SUMMARY JUDGMENT ON  
COUNTERCLAIM FOR STATUTORY ATTORNEYS' FEES -1

OSERAN HAHN SPRING & WATTS P.S.  
10900 NE Fourth Street #850  
Bellevue WA 98004  
Phone: (425) 455-3900  
Facsimile: (425) 455-9201

ORIGINAL

## I. INTRODUCTION

Plaintiffs filed a lawsuit against AMP and multiple other defendants seeking class action certification. Plaintiffs' claims were based primarily on the Washington State usury statutes contained at RCW 19.52. AMP originated the plaintiffs' loans more than four years prior to the filing of this lawsuit and immediately assigned them to the entity which funded the loans. This Court dismissed the statutory usury claims made by plaintiffs against AMP because AMP was not a "current creditor," the only proper defendant to a statutory usury claim. This Court should find that the plaintiffs' statutory usury claims were frivolously commenced against AMP, and award AMP its attorneys' fees as a result. This Court is authorized to make such an award under RCW 19.52.032.

## II. FACTS

On May 25, 2001, plaintiffs filed a Class Action Complaint for Damages and Restitution in King County Superior Court. This action was subsequently removed to United States District Court by some of the defendants. The Class Action Complaint for Damages and Restitution has been amended on multiple occasions. The case at issue in this motion, *Stone et al. v. American Mortgage Professionals, Inc. et al.*, has been consolidated with several other cases, which contain similar allegations of usury.

Plaintiffs alleged that AMP originated the Loans at interest rates exceeding those permitted by the Washington State usury statute, that AMP was not properly licensed to do so under the Washington Consumer Loan Act (contained at RCW 31.04) until after the plaintiffs' loans were originated, and that AMP was therefore liable for statutory usury penalties. These claims were made in spite of the fact that no Plaintiff ever made a loan payment to AMP.<sup>1</sup> The original Complaint contained no allegations of common

<sup>1</sup> Order Granting in Part and Denying in Part AMP's Motion for Summary Judgment (4:7-8).

1 law usury, but the plaintiffs later incorporated this claim following identification of this  
 2 cause of action by the Defendants. AMP made a counterclaim against the plaintiffs for  
 3 statutory attorneys' fees under RCW 19.52.032.

4 Plaintiffs claims for statutory usury against AMP were dismissed by this Court on  
 5 summary judgment. That ruling was unsuccessfully appealed by the plaintiffs to the  
 6 Ninth Circuit Court of Appeals and remains intact.

### III. ARGUMENT AND AUTHORITY

#### A. Plaintiffs Have Filed A Frivolous Claim Against AMP For Statutory Usury.

9 The Washington Usury Statutes are contained at RCW 19.52 and provide a  
 10 maximum interest rate for certain transactions, and penalties which may apply should  
 11 the maximum rate be exceeded. RCW 19.52.032 specifically explains against whom a  
 12 statutory usury claim may be maintained and further authorizes an award of attorneys'  
 fees for a defendant subjected to a frivolous claim:

13 The debtor, if a natural person, or the creditor may bring an  
 14 action for declaratory judgment to establish whether a loan  
 15 or forbearance contract is or was usurious, and such an  
 16 action shall be considered an action on the contract for the  
 17 purposes of applying the provisions of RCW 19.52.030.  
Such an action shall be brought against the current creditor  
or debtor on the contract or, if the loan or debt has been fully  
repaid, by the debtor against the creditor to whom the debtor  
was last indebted on the contract. No such action shall be  
 18 commenced after six months following the date the final  
 19 payment becomes due, whether by acceleration or  
 otherwise, nor after six months following the date the  
 20 principal is fully paid, whichever first occurs. If the debtor  
commences such an action and fails to establish usury, and  
if the court finds the action was frivolously commenced, the  
defendant or defendants may, in the court's discretion,  
recover reasonable attorney's fees from the debtor  
 21 (emphasis added).

22 As stated above, a statutory usury claim may only properly be brought against a  
 23 "current creditor." Using plaintiff Paula Scott as an example, she received a first written

1 notice that their loan would be assigned at the time of application and a second written  
 2 notice when the assignment did occur.<sup>1</sup> The assignments of the plaintiffs' deeds of  
 3 trusts are also matter of public record. In its Order Granting in Part and Denying in Part  
 4 Defendant AMP's Motion for Reconsideration,<sup>2</sup> this Court remarked:

5       In the present case, AMP is not Scott's current creditor. It  
 6 assigned all of its rights to FirstPlus in 1997. Consequently,  
 7 given that the language of the statute is clear and  
 unambiguous, Scott's statutory usury claim against AMP  
 must fail and is dismissed.

8 The statutory usury claims made by plaintiffs in this lawsuit should never have been  
 9 brought against AMP.

10 Plaintiffs never alleged that AMP was a "current creditor," but rather sought to  
 11 contort RCW 19.52.032 beyond its plain meaning. Plaintiffs consistently relied on the  
 12 case of *Durias v Boswell*, 58 Wn. App. 100, 791 P.2d 282 (1990), for the proposition  
 13 that under RCW 19.52.032 a loan originator is jointly and severally liable with a "current  
 14 creditor" under Washington law. *Durias* says exactly the opposite of what plaintiffs have  
 15 represented. It holds that an assignee may be liable for the acts of an originator, not  
 16 that an originator may be liable for the acts of an assignee. While discussing *Durias* in  
 17 its Order Granting in Part and Denying in Part Defendant AMP's Motion for  
 18 Reconsideration,<sup>3</sup> this Court agreed with AMP that the case was "inapposite." That  
 finding remains undisturbed following the plaintiffs' appeal.

#### 19 **B. AMP's Claim for Attorneys Fees Under RCW 19.52.032 Should be Granted.**

20 If a debtor commences an action, fails to establish usury, and if the court finds  
 21 the action was frivolously commenced, the defendant may, in the court's discretion,

22       <sup>1</sup> See Exhibits 4 and 11 to the Declaration of Ken Terrill in Support of AMP's Motion for Reconsideration.

23       <sup>2</sup> Order Granting in Part and Denying in Part Defendant AMP's Motion for Reconsideration (3:4-8).

24       <sup>3</sup> Order Granting in Part and Denying in Part Defendant AMP's Motion for Reconsideration (3:16-22).

1 recover reasonable attorney's fees from the debtor under RCW 19.52.032. AMP  
2 believes that the plaintiffs' commencement of statutory usury claims against AMP merits  
3 such an award. The plaintiffs were aware of the assignment of their loans years before  
4 they filed their Complaint. In fact, they were informed that this would occur shortly after  
5 the onset of their dealings with AMP. Not only have the plaintiffs blatantly disregarded  
6 the enumerated procedure for pursuit of a statutory usury claim, they have aggressively  
7 sought to support their actions with gross misstatements of law. Attorneys' fees should  
8 be awarded to AMP upon the submittal of further evidence of the actual fees it has  
9 incurred.

### CONCLUSION

10 AMP was involved in lending transactions with the plaintiffs which occurred more  
11 than four years prior to the filing of this lawsuit. AMP immediately assigned the loans at  
12 issue, notified the plaintiffs of this fact, and had no further involvement with them.  
13 Regardless, the plaintiffs proceeded to file statutory usury claims against AMP as their  
14 "current creditor." Those claims were dismissed by this Court, and the dismissal was  
15 unsuccessfully appealed by the plaintiffs. Under RCW 19.52.032, AMP should be  
16 awarded attorneys' fees stemming from this frivolous claim made by the plaintiffs. A  
17 separate motion to approve AMP's fees will be submitted upon entry of an order  
18 granting this motion.

19 Respectfully submitted, this \_\_\_\_\_ day of February, 2005.

20 OSERAN HAHN SPRING & WATTS P.S.

21 By By: s/James B. Hoff  
WSBA #19424  
22 Attorneys for American Mortgage  
Professionals, Inc.  
10900 NE 4<sup>th</sup> St., #850  
23 Bellevue, WA 98004

24 DEFENDANT AMERICAN MORTGAGE PROFESSIONALS  
INC.'S MOTION FOR SUMMARY JUDGMENT ON  
COUNTERCLAIM FOR STATUTORY ATTORNEYS' FEES -5

OSERAN HAHN SPRING & WATTS P.S.  
10900 NE Fourth Street #850  
Bellevue WA 98004  
Phone: (425) 455-3900  
Facsimile: (425) 455-9201

1 Telephone: 425.455.3900  
2 Fax: 425.455.9201  
3 E-mail: [jimhoff@oseranhahn.com](mailto:jimhoff@oseranhahn.com)

4 CERTIFICATE OF SERVICE

5 I hereby certify that on February 14, 2005, I electronically filed the  
6 foregoing with the Clerk of the Court using the CM/ECF system, which will send  
7 notification of such filing to the following:

8 Christopher Ian Brain - [cbrain@tousley.com](mailto:cbrain@tousley.com)  
9 Beth E. Terrell – [bterrell@tousley.com](mailto:bterrell@tousley.com)  
Michael Duane Daudt – [mdaudt@tousley.com](mailto:mdaudt@tousley.com)  
Amanda M. Steiner – [asteiner@tousley.com](mailto:asteiner@tousley.com)  
Kevin Bay – [bay@ryanlaw.com](mailto:bay@ryanlaw.com)  
Curt Roy Hineline – [hineline.curt@dorsey.com](mailto:hineline.curt@dorsey.com)  
Richard M. Clinton – [Clinton.Richard@dorsey.com](mailto:Clinton.Richard@dorsey.com)  
Douglas L. Davies – [davies.doug@dorsey.com](mailto:davies.doug@dorsey.com)  
Thuy Nguyen Leeper – [leeper.thuy.nguyen@dorsey.com](mailto:leeper.thuy.nguyen@dorsey.com)  
Michele Radosevich – [Micheleradosevich@dwt.com](mailto:Micheleradosevich@dwt.com)  
Jason C. Klein – [jasonklein@dwt.com](mailto:jasonklein@dwt.com)  
Cory Zion – [zioco@foster.com](mailto:zioco@foster.com)  
Jeffrey S. Miller – [milje@foster.com](mailto:milje@foster.com)  
Stellman Keehnel – [keest@foster.com](mailto:keest@foster.com)  
J. William Ashbaugh – [washbaugh@staffordfrey.com](mailto:washbaugh@staffordfrey.com)  
Kenneth Hobbs – [khobb@staffordfrey.com](mailto:khobb@staffordfrey.com)  
Vernon L. Woolston, Jr. – [vwoolston@perkinscoie.com](mailto:vwoolston@perkinscoie.com)

17 Also, service has been made via regular U.S. Mail, postage prepaid upon  
18 the following non-electronic ECF recipients:

19 Thomas L Allan  
20 Reed Smith  
21 435 6<sup>th</sup> Avenue  
22 Pittsburgh PA 15219

23 Patrick K. Cavanaugh  
24 Reed Smith  
25 435 6<sup>th</sup> Avenue  
Pittsburgh PA 15219

DEFENDANT AMERICAN MORTGAGE PROFESSIONALS  
INC.'S MOTION FOR SUMMARY JUDGMENT ON  
COUNTERCLAIM FOR STATUTORY ATTORNEYS' FEES -6

OSERAN HAHN SPRING & WATTS P.S.  
10900 NE Fourth Street #850  
Bellevue WA 98004  
Phone: (425) 455-3900  
Facsimile: (425) 455-9201

1  
Ward B. Coe  
2 Whiteford Taylor & Preston  
7 St Peter Street  
3 Baltimore, MD 21202-1626

4 Todd L. McLawhorn  
5 Katten, Muchin & Zavis  
525 W. Monroe Street  
6 Suite 1600  
Chicago, IL 60661-3693

7 Kevin L Oufnac  
Richardson Patrick Westbrook & Brickman  
8 P.O. Box 879  
Charleston, SC 29402

9 Paul E. Ridley  
10 Kirkpatrick & Lockhart  
2828 N. Harwood Street  
11 Suite 1800  
Dallas, TX 75201-6966

12 Elizabeth S. Welsh  
13 Kirkpatrick & Lockhart  
2828 N. Harwood Street  
14 Suite 1800  
Dallas, TX 95201-6966

15 DATED this 14<sup>th</sup> day of February, 2005.

16 OSERAN HAHN SPRING & WATTS P.S.  
17

18 By: s/Donna Strauss, Assistant to  
James B. Hoff, WSBA #19424  
19 Attorneys for American Mortgage Professionals,  
Inc.  
20 10900 NE 4<sup>th</sup> Street, #850  
Bellevue, WA 98004  
21 Phone: 425.455.3900  
Fax: 425.455.9201  
E-mail: jimhoff@oseranhahn.com